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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 561

GLADYS BROADHURST,
Petitioner and Appellant Below,

vs.

STATE OF OREGON,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 561

GLADYS BROADHURST,
Petitioner and Appellant Below,

vs.

STATE OF OREGON,

Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

Petitioner was indicted by the Grand Jury of Malheur County, State of Oregon, on October 29, 1946, for the crime of the first degree murder, charging that she aided and abetted one Alvin Lee Williams in the commission of the

murder of her husband, Dr. Willis D. Broadhurst. (Tr. of R. 1.) Thereafter, petitioner was tried on this indictment in the Circuit Court of the State of Oregon, for the County of Malheur, and was convicted of the crime as charged. (Tr. of R. 5.) Whereupon, she was sentenced by the Trial Court to life imprisonment on March 24, 1947. (Tr. of R. 5, 6.)

The principal witness for the prosecution was the said Alvin Lee Williams, who was, at the time of petitioner's trial, under a separate indictment for the murder of Broadhurst. (Tr. of R. 29-31.)

According to the testimony of Williams, he had been employed by Dr. Broadhurst as a ranch hand, and first met petitioner shortly after her marriage to Broadhurst in June, 1946. In August, 1946, Dr. Broadhurst requested Williams to accept employment as a chauffeur for the purpose of driving petitioner on a trip to California. (Tr. of Ev. 254-256.) On August 5, 1946, Williams and petitioner left in a car for California. (Tr. of Ev. 258.)

Williams testified that throughout this whole trip, beginning almost at its inception until their return to Caldwell, Idaho, on September 22, 1946, he and petitioner were intimate and occupied the same bed almost every night. He further testified that during this trip petitioner started talking to him about getting rid of Dr. Broadhurst, and that these conversations continued after their return up until the night prior to the day when Dr. Broadhurst was killed. (Tr. of R. 54-58; Tr. of Ev. 284, 285, 286, 287, 288, 299-301, 308, 310-311, 318-321.)

Williams related on the witness stand that on October 14, 1946, he waited on the highway for Dr. Broadhurst to pass. In the afternoon of that day Dr. Broadhurst came by, and stopped his car and asked Williams if he had car trouble. Williams replied that he thought his gas line was clogged,

and while Broadhurst was bending over the engine in an attempt to fix it Williams hit him in the back of the head with a wrench. Some seconds later Broadhurst recovered and started after Williams, who thereupon seized a shotgun from his car and shot Broadhurst, who died almost immediately. Later that night Williams disposed of the body, the gun, and his clothes. He removed money and other articles from Broadhurst's pockets and delivered them to petitioner. (Tr. of R. 58, 60, 63-68.) A couple of days later Dr. Broadhurst's body was found, and shortly thereafter Williams was arrested, and a day or two later petitioner was arrested.

On January 3, 1947, and prior to petitioner's pleading or demurring to the indictment, petitioner filed a motion to quash the indictment on the ground that as appears from the indictment itself the only witnesses before the Grand Jury were C. W. Glenn, Sheriff of Malheur County, Oregon, and Walter S. Walker, a member of the Oregon State Police, both of whom had been active in investigating the killing of Dr. Broadhurst. As appears from petitioner's motion, these officers had no actual knowledge of any possible connection of petitioner with the commission of this crime, and that their only information could have been derived from Williams, which would make their testimony before the Grand Jury purely hearsay and incompetent. Williams himself did not testify before the Grand Jury. The Trial Court denied this motion without opinion. (Tr. of R. 14-16.)

After the arrest of petitioner on October 18, 1946, and while she was incarcerated, Charles W. Swan, District Attorney for Malheur County, Oregon, Charles W. Glenn, Sheriff of Malheur County, Oregon, Walter S. Walker, of the Oregon State Police, and A. A. Moline, Sheriff of Canyon County, Idaho, went to petitioner's home at Caldwell,

Idaho, and without any search warrant and without the knowledge or consent of petitioner, made a search of her home, and found in the hot air vent in her bedroom certain papers and documents. (Tr. of R. 33-38, 40-41, 51-52.)

Prior to the trial of petitioner she filed with the Trial Court her petition for return of documents, to which the District Attorney filed a counter-affidavit. (Tr. of R. 17-20) This petition was denied by the Trial Court (Tr. of Ev. 178-185), and the articles so taken by these officers were admitted in evidence over the objection of petitioner during the trial of this cause. (Tr. of R. 52)

When Alvin Lee Williams was, during the trial, first offered as a witness for the prosecution, petitioner objected to his competency on numerous grounds, one of which was that he was at that time a co-defendant with petitioner, and was under an indictment charging him with first degree murder for the killing of Dr. Broadhurst, which indictment was still pending and had not been disposed of, and he was incompetent to be a witness in this case. (Tr. of R. 29-31) And the Trial Court upheld the objection on the ground that no conspiracy between Williams and petitioner had at that time been established. (Tr. of R. 31-33) Subsequently, Williams was again offered as a witness by the prosecution, to which the same objections were made by petitioner, and at that time overruled by the Trial Court. (Tr. of R. 53-54)

Jurisdictional Statement

Petitioner was convicted of the crime of first degree murder on March 13, 1947, and was sentenced to life imprisonment on March 24, 1947. Petitioner made and filed a motion for new trial, which was denied April 22, 1947. Petitioner thereupon appealed to the Supreme Court of the State of Oregon, which Court affirmed the judgment of the Trial Court on July 9, 1948. A petition for rehear-

ing was filed by petitioner in the Supreme Court of the State of Oregon, which petition was denied on September 15, 1948. An order extending time within which to file this petition for writ of certiorari up to and including February 12, 1949, was signed by Mr. Justice Douglas, Associate Justice of the Supreme Court of the United States, on December 10, 1948.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 USCA 344 (Appendix, p. 31).

It is the position of your petitioner that the Trial Court, in permitting her co-defendant Alvin Lee Williams to testify while the indictment against him was still pending, denied to petitioner the due process of law as guaranteed her by the Fourteenth Amendment to the Constitution of the United States. (Appendix, p. 31) The Oregon Statutes prescribe in part who may and who may not be a witness in the trial of a criminal case: O.C.L.A. Sections 26-924, 26-925, 26-934, and 3-102. (Appendix, p. 31 et seq.) The Oregon Court has consistently held that under O.C.L.A. Sections 26-924 and 26-925, and similar previous statutes, a co-indictee is not competent to be a witness to testify for or against his co-defendant on trial where the indictment against the proposed witness was still pending.

Latshaw v. *Territory,* 1 Ore. 140 (1854);
State v. *Drake,* 11 Ore. 396;
State v. *Hale,* 141 Ore. 332; 18 P. (2) 219.

This rule is approved by the Oregon Supreme Court in its opinion in this case. Accepting this rule as the undisputed law of Oregon, petitioner asserts that as Williams was under indictment for the same crime with which she was charged he was not competent to testify. As appears from the rul-

ings of the Trial Court and the opinion of the Supreme Court of Oregon in this case, Williams' competency was upheld on the ground that as he was separately indicted he was eliminated from the proscription of the general Oregon rule, and was thus a competent witness. The practical result of this ruling, as urged by petitioner, is to endow the District Attorney with the power to determine in advance of trial, and regardless of the circumstances of the case or of the condition of the parties whether or not an accomplice of a defendant on trial for a crime shall or shall not be a competent witness. Thus, if the District Attorney ascertains that the accomplice will testify favorably for the prosecution he will have the accomplice and the defendant separately indicted. But, if he ascertains that the testimony of the accomplice would favor the defendant he may then have them jointly indicted, thus rendering the accomplice wholly incompetent to testify at all. This is clearly a denial to this petitioner of the equal protection of the laws and of a trial by due process of law, which the Fourteenth Amendment assures to her.

The petitioner objected to the competency of Alvin Lee Williams when he was first offered by the prosecution as a witness (Tr. of R. 31), and again when he was subsequently offered by the prosecution as a witness (Tr. of R. 53). The incompetency of Williams' testimony was asserted in petitioner's motion for a new trial (Tr. of R. 103), and the same objection was asserted in petitioner's assignments of error Nos. VIII and XIX on appeal to the Supreme Court of the State of Oregon; and was again asserted in petitioner's petition for rehearing before the Oregon Supreme Court (Tr. of R. 168 and 170).

Petitioner submits that the failure of the Trial Court to quash the indictment, or in the alternative to permit her to examine under oath the witnesses appearing before the

Grand Jury, was a denial to her of the due process of law provision of the Fourteenth Amendment. The only two witnesses to appear before the Grand Jury were Charles W. Glenn, Sheriff of Malheur County, Oregon, and Walter S. Walker, a member of the Oregon State Police. These officers were active in the investigation of the crime and in the interrogation of Alvin Lee Williams, and were instrumental in obtaining his confession. Petitioner made no confession nor admission to either of these officers. It was impossible for these officers to have any actual information concerning any possible connection of petitioner with this crime; consequently, any testimony they gave before the Grand Jury would be purely hearsay and incompetent. The Statute of Oregon, O.C.L.A. Section 26-506, requires that the Grand Jury may receive only competent evidence. (Appendix, p. 32) The violation of this Statute and the indicting of petitioner by the Grand Jury based on wholly incompetent evidence is a violation of the Fourteenth Amendment.

Prior to her pleading to the indictment or demurring thereto, petitioner did, on January 3, 1947, file a motion to quash the indictment, setting forth her objections thereto. (Tr. of R. 14-15)

In her motion for a new trial petitioner reiterated her objection to the validity of this indictment. (Tr. of R. 103) This objection is set forth in petitioner's assignments of error to the Oregon Supreme Court, No. I (Tr. of R. 107).

This position was again asserted in petitioner's petition for rehearing to the Supreme Court of Oregon (Tr. of R. 168, 175-176).

It is the position of petitioner that the Trial Court violated the Fourteenth Amendment and withheld from her due process of law by admitting in evidence papers and documents obtained by an unlawful search of her home. On

February 21, 1947, and prior to the commencement of her trial, petitioner asserted this objection in her timely petition for the return of documents. (Tr. of R. 17-20) During the trial of her cause the same objection was raised by petitioner's objection to the testimony of A. A. Moline (Tr. of R. 35), to the testimony of Charles W. Glenn (Tr. of R. 35-37), to the testimony of Walter S. Walker (Tr. of R. 37-39), and to the introduction of State's Exhibits Nos. 42 to 47 inclusive (Tr. of R. 51-52. Petitioner again asserted this objection in her motion for new trial (Tr. of R. 104), and in her assignments of error to the Supreme Court of Oregon, Nos. III, X and XVII; and was again raised in petitioner's petition for rehearing to the Oregon Supreme Court (Tr. of R. 167, 168-170).

There is a final judgment of the highest court in the State of Oregon in which a decision could be had. The affirmance by the Supreme Court of the State of Oregon of the judgment of the Trial Court, and the denial by the Supreme Court of the State of Oregon of petitioner's petition for rehearing, completely exhausts all remedies of your petitioner in the Courts of the State of Oregon.

Questions Presented

The questions herein presented are:

1. That the Trial Court violated the Fourteenth Amendment to the Constitution of the United States, and denied to petitioner the equal protection of the laws and due process of law as guaranteed thereunder, by admitting the testimony of Alvin Lee Williams while he was at that time under an indictment for the murder of Willis D. Broadhurst, which had not then been disposed of.

2. It was a denial of due process of law and a violation of the Fourteenth Amendment for the Trial Court to refuse

to quash the indictment against petitioner when the only evidence presented to the Grand Jury tending to connect petitioner with the crime was hearsay and wholly incompetent.

3. The Trial Court erred in admitting in evidence the papers and documents wrongfully seized in the home of petitioner during an unlawful search thereof, and thereby violated the Fourteenth Amendment, and withheld from petitioner her right to a trial by due process of law.

Reasons Relied On for Allowance of the Writ

In petitioning this Honorable Court for a writ of certiorari directed to the Supreme Court of the State of Oregon, your petitioner submits that the basis thereof is that the questions presented, as heretofore enumerated, disclose a denial by the Courts of Oregon of a right, privilege or immunity especially set up and claimed by petitioner under the Fourteenth Amendment to the Constitution of the United States, and presents to this Court a Federal question of substance decided by the Oregon Courts and not heretofore determined by this Court.

The Competency of Alvin Lee Williams as a Witness

1. It is firmly established in the State of Oregon that where two or more persons are jointly indicted for the same crime, and such indictment has not been dismissed nor disposed of, no one of them is competent to be a witness in the trial of any co-indictee either on his behalf nor for the prosecution. O. C. L. A. 26-924, 26-925 (Appendix, pp. 31, 32).

Latshaw v. *Territory*, 1 Ore. 140;
State v. *Drake*, 11 Ore. 396;
State v. *Hale*, 141 Ore. 332, 18 P. (2) 219.

See also the Opinion of the Oregon Supreme Court in the case at bar.

Petitioner accepts this doctrine as the established law of Oregon. That being true, to permit an accomplice accused of the same crime as a defendant to testify for the prosecution on the flimsy and technical distinction that the accusation against the witness is contained in a separate indictment is a clear and substantial denial to the defendant of the equal protection of the laws and of due process of law assured by the Fourteenth Amendment. The practical result of such a decision empowers any District Attorney with the authority to determine the competency of such witness in advance of trial, and the determination of such competency is not based upon any rule of law nor any standards of evidence, either statutory or judicial, but rather lies in the arbitrary and ungoverned caprice of a prosecutor. Thus, the power to determine competency does not lie with the Court, but lies with the prosecutor who may, by the simple device of jointly or separately indicting two or more accomplices, binds the Court as to what evidence shall be presented to the Jury. It is difficult to imagine a more clear cut case of a denial of equal protection of the laws. Unless this Court sees fit to reverse the decision of the Oregon Court, then hereafter any defendant in Oregon charged with a crime supposedly committed with the aid of an accomplice will be at the mercy of the prosecutor. Equal protection of the laws guarantees that the same laws shall be applied in the same way to each defendant, and not that rules of evidence may be determined in advance of trial at the sole option of the counsel for the State. The far reaching effects of this doctrine are readily apparent and present a Federal question of substance.

This Court has frequently held that the wrongful admission of testimony is a denial of equal protection of the laws and of due process of law under the Fourteenth Amendment.

Ward v. *Texas*, 316 U. S. 546, 86 L. Ed. 1663 (1941);

White v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342 (1939);
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716 (1939);
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1944);
Fiske v. *Kansas*, 274 U. S. 380, 71 L. Ed. 1108 (1926).

2. The refusal of the Trial Court, approved by the Oregon Supreme Court, to quash the indictment which was based, insofar as this petitioner is concerned, solely upon the hearsay testimony of two investigating officers, is a denial of due process of law and a violation of the Fourteenth Amendment. This Court has frequently held that it will make an independent investigation of the Grand Jury process, and when that discloses such capricious, arbitrary and wrongful procedures as to shock the conscience and violate the fundamental rights of the citizens of this country, it will reverse the State Court proceedings.

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1934);
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158 (1942);
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417 (1903);
Hale v. *Kentucky*, 303 U. S. 614, 82 L. Ed. 1050 (1937);
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500 (1935).

See also:

Fay v. *New York*, 332 U. S. 261, 91 L. Ed. 2043 (1946).

The Oregon Statute, O. C. L. A. 26-506 (Appendix, p. 32) requires that the Grand Jury shall receive nothing but competent evidence. This Court has held that where the statute of a State provides for Grand Jury procedure within the confines of the directive of the Fourteenth Amendment, nevertheless, this Court will look beyond such a statute to determine whether or not the administrative officers in fact

complied with such a statutory mandate, or whether their gross disregard thereof results in a denial of due process.

Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839 (1899);
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1948).

Although counsel for petitioner has not found an adjudication of this Court directly in point on this question presented, nevertheless, the inferior Federal Courts and the Courts of many States have determined that the refusal of a Trial Court to quash an indictment based solely upon incompetent evidence is a withholding from the defendant of the rights guaranteed to him by the Constitution.

U. S. v. *Harrington*, 5 Fed. 343 (1881);
U. S. v. *Rubin*, 218 Fed. 245 (1914);
People v. *Nitzburg*, 289 N. Y. 523, 47 N. E. (2) 37;
People v. *Glen*, 173 N. Y. 395, 66 N. E. 112;
Royce v. *Territory*, 5 Okla. 61, 47 Pac. 1083.

3. After petitioner was arrested and confined in jail, the District Attorney of Malheur County, Oregon, the Sheriff of Malheur County, a member of the Oregon State Police, and the Sheriff of Canyon County, Idaho, went to the home of petitioner near Caldwell, Idaho, and without a search warrant, and without the consent or knowledge of petitioner, searched her home and removed from a ventilator in her bedroom certain papers and documents. Petitioner made a timely motion for a return of these documents, which was denied. Thereafter, during the trial of her case, and over her objection, the Trial Court admitted these papers and documents obtained by this wrongful search and seizure in evidence. Petitioner asserts that these actions of the Trial Court, approved by the Oregon Supreme Court, amounted to a denial to her of due process of law under the Fourteenth Amendment.

This Court has frequently held that the admission in evidence in the Federal Courts of evidence obtained by an

unlawful search and seizure is a denial to a defendant of the constitutional protection afforded by the Fourth and Fifth Amendments.

Weeks v. *U. S.*, 232 U. S. 383, 58 L. Ed. 652;
Boyd v. *U. S.*, 142 U. S. 450, 35 L. Ed. 1077;
Agnello v. *U. S.*, 269 U. S. 20, 70 L. Ed. 145.

Although the Fourth and Fifth Amendments do not apply to the States, and the Fourteenth Amendment does not directly place upon the States the inhibitions contained in these two Amendments, nevertheless, where the rights guaranteed by any of the first eight Amendments are the law of the land and embody a fundamental concept of justice which lies at the base of our civil and political institutions, this Court will use such Amendments as a criteria in determining the application of the due process of law provision of the Fourteenth Amendment.

Mooney v. *Hollohan*, 294 U. S. 103, 79 L. Ed. 791 (1934);
Chicago B. & Q. Railway Co. v. *Chicago*, 166 U. S. 220, 41 L. Ed. 979 (1896);
Scott v. *McNeal*, 154 U. S. 34, 38 L. Ed. 896 (1893).

The Constitution of the State of Idaho, Article I, Section 17 (Appendix, p. 32) prohibits unlawful searches and seizures. The Supreme Court of the State of Idaho has repeatedly declared that evidence so obtained is inadmissible.

State v. *Arregui*, 44 Ida. 43, 254 Pac. 788 (1927);
State v. *Conner*, 59 Ida. 695, 89 Pac. (2) 197 (1939);
State v. *Dawson*, 49 Ida. 495, 235 Pac. 326 (1925).

A similar constitutional provision is found in Oregon, Article I, Section 9 (Appendix, p. 33), and the same rule as to inadmissibility of such evidence is established in that State.

State v. *McDaniel*, 115 Ore. 187, 231 Pac. 965, 237 Pac. 373.

Thus, it appears that these Oregon officials, acting in their official capacity, went to Idaho and, completely disregarding the rights of petitioner as guaranteed by the Idaho Constitution, unlawfully searched her house and seized these papers and documents. They returned with them to Oregon, where the same constitutional inhibitions obtain, and the Trial Court thereafter disregarded the rules of evidence established in both Idaho and Oregon and admitted these exhibits in evidence. Unless the Fourteenth Amendment affords petitioner relief from such outrageous acts, then hereafter State officials may with impunity disregard not only the established rules erected by the constitutions, statutes and common law, but also the fundamental law of the land. The condonation by the Court of these activities of the Oregon officials, and the admission of the evidence wrongfully so obtained, is a denial of due process of law, and presents a Federal question of substance.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Oregon, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Oregon be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: January 15, 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 561

GLADYS BROADHURST,
Petitioner and Appellant Below,

vs.

STATE OF OREGON,
Respondent and Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the Supreme Court of the State of Oregon is reported in 196 Pac. (2d) 407, and is found in the record page 111. The trial court rendered no written opinion, but delivered an oral opinion in ruling that Alvin Lee Williams was a competent witness, record page 31. The oral opinion

of the trial court in denying the Petition of petitioner for return of documents is found in the record, Tr. of Ev. page 178.

Jurisdiction

The date of the judgment of the Supreme Court of the State of Oregon to be reviewed is July 9, 1948. A petition for rehearing was filed in said court by petitioner, which was denied on September 15, 1948. By order dated December 10, 1948, Mr. Justice Douglas, Associate Justice of the Supreme Court of the United States, extended the time within which to file the petition for writ of certiorari in this case to and including February 12, 1949.

The jurisdiction of this court is invoked under Judicial Code 237(b) as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U.S.C.A. 344(b). The Supreme Court of Oregon has decided Federal questions of substance not heretofore determined by this court. (Supreme Court Rule 38(5)(a).)

Statement of the Case

The material facts in this case have already been stated in the preceding Petition for Writ of Certiorari, and that statement is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Malheur County, Oregon, erred in holding that Alvin Lee Williams was a competent witness at the time when he was under indictment for the same crime with which petitioner was charged, which indictment had not then been disposed of.

2. The Circuit Court of Malheur County, Oregon, erred in refusing to quash the indictment returned against petitioner on the ground that no competent evidence was pre-

sented to said grand jury tending to connect petitioner with the crime charged.

3. The Circuit Court of Malheur County, Oregon, erred in refusing petitioner's motion to examine under oath C. W. Glenn and Walter S. Walker as to their testimony before the grand jury.

4. The Circuit Court of Malheur County, Oregon, erred in refusing petitioner's motion to examine under oath E. Otis Smith, District Attorney of Malheur County, Oregon, as to what facts were known to him as being available for presentation to the grand jury tending to corroborate any statement or testimony of the principal defendant, Alvin Lee Williams.

5. The Circuit Court of Malheur County, Oregon, erred in refusing to grant petitioner's petition for return of documents wrongfully and unlawfully obtained by the officials of the State of Oregon from the home of petitioner by unlawful search and seizure.

6. The Circuit Court of Malheur County, Oregon, erred in admitting in evidence, over the objection of petitioner, papers and documents obtained by the Oregon officials from the home of petitioner by unlawful search and seizure.

7. The Supreme Court of the State of Oregon erred in affirming the judgment of the Circuit Court of Malheur County, Oregon.

8. The Supreme Court of the State of Oregon erred in denying petitioner's petition for rehearing.

Summary of the Argument

Point A. The Oregon law renders a witness who is charged with the same crime in the same indictment as the defendant incompetent to testify for or against the defend-

ant. Therefore, to permit the District Attorney to make a co-defendant competent to testify for the prosecution by the simple device of returning a separate indictment against such witness is a denial to the defendant on trial of the equal protection of the laws and of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Point B. Where the only evidence presented to the grand jury is hearsay testimony and incompetent, the refusal of the trial court to quash the indictment is a denial of due process of law assured by the Fourteenth Amendment to the Constitution of the United States.

Point C. Where evidence is secured by the State officials by unlawful search and seizure, the admission of such evidence against the defendant is a denial to the defendant of due process of law provided by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

Point A

The Oregon law renders a witness who is charged with the same crime in the same indictment as the defendant incompetent to testify for or against the defendant. Therefore, to permit the District Attorney to make a co-defendant competent to testify for the prosecution by the simple device of returning a separate indictment against such witness is a denial to the defendant on trial of the equal protection of the laws and of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Oregon statutory law governing the competency of witnesses in criminal cases is found in O.C.L.A. Sections 26-924, 26-925, 26-934 and 3-102 (Appendix, p. 31 et seq).

These statutes need not be considered in detail. It shall suffice for the purpose of this discussion, to point out that it has long been the settled law in Oregon, and confirmed by the Supreme Court thereof in this case, that one indicted in the same indictment for the same crime as the petitioner on trial, is not competent to be a witness in that trial for or against the petitioner, where the indictment against him is still pending and not disposed of.

Latshaw v. *Territory*, 1 Ore. 140;
State v. *Drake*, 11 Ore. 396;
State v. *Hale*, 141 Ore. 332, 18 P. (2) 219.

In contra distinction to this rule the Oregon Courts have now held in this case that if such co-defendant be charged in a separate indictment he then is a competent witness for the prosecution in the trial of the cause. Petitioner asserts that such a ruling is a denial to her of due process of law. Prior to this case it has been established jurisprudence that the competency of a witness is determined by statute or the rules of common law. But under the doctrine that the Oregon Supreme Court announced in this case such is no longer true. The competency of a witness will not be decided by statute nor by the Court; instead, it will be fixed, beyond the power of the trial court to alter, by the Prosecuting Attorney, in advance of trial, in the manner in which he believes will be most beneficial to his case. It might be said that as the Prosecuting Attorney is in one sense an officer of the Court he will be interested only in justice and will be zealous in protecting the rights of the accused as of the State. Unfortunately, this is not true in practice, and the anxiety of a prosecutor to obtain a conviction and do all that he legally may do to obtain a conviction will result in his making a co-defendant competent or not turn upon his decision as to the advantages the prosecution may obtain thereby. It

should be clarified that petitioner is not now contending that a co-defendant should be held to be incompetent in all cases as a matter of policy. Her position is that the competency of such co-defendant should not be left to the decision of the prosecutor, and to permit him to declare a witness competent on the basis of whether it will or will not aid the prosecution is a denial of equal protection of the laws and of due process of law under the Fourteenth Amendment. If a defendant is accused of a crime in Oregon, under this rule, and is supposed to have had an accomplice, whether or not that accomplice is competent as a witness and whether or not his testimony may be presented to the Jury depends solely upon whether such testimony will be favorable or unfavorable to the defendant. If the accomplice will testify for the State and assist in the prosecution, the prosecutor will separately indict him so that his testimony may be offered; if the accomplice would testify in favor of the defendant, then the prosecutor will indict them jointly so that the testimony may be kept from the Jury. Petitioner submits that this results in a government not of laws but of men, when the prosecutor, and not the Judge, is vested with the power and authority to determine the admissibility of evidence.

This Court has on many occasions examined the question of admissibility of evidence, and has held that where incompetent evidence is admitted in violation of the fundamental laws and concepts of this country and in derogation of the dignity and rights of man, the Fourteenth Amendment is violated by a denial of due process.

Ward v. *Texas,* 316 U. S. 546, 86 L. Ed. 1663;
White v. *Texas,* 310 U. S. 530, 84 L. Ed. 1342 (1939);
Akins v. *Texas,* 325 U. S. 398, 89 L. Ed. 1692 (1944);
Fiske v. *Kansas,* 274 U. S. 380, 71 L. Ed. 1108 (1926).

This Court said in *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716 (1939):

> "Third. The scope and operation of the XIV Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the XIV Amendment—just as that in the V—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."

Thus, a substantial Federal question is now presented to this Court as to whether the Fourteenth Amendment will permit a delegation of authority to one of the advocates in a trial to determine the admissibility of evidence, resulting in the denial to a defendant of her liberty for life, as in this case, or even of life itself.

Point B

Where the only evidence presented to the Grand Jury is hearsay testimony and incompetent, the refusal of the trial Court to quash the indictment is a denial of due process of law assured by the Fourteenth Amendment to the Constitution of the United States.

The Oregon statute, O. C. L. A. 26-506 (Appendix, p. 32) provides that a Grand Jury may not receive incompetent evidence. It appears that in this case the only witnesses to appear before the Grand Jury were Charles W. Glen,

Sheriff of Malheur County, Oregon, and Walter S. Walker, Sergeant of the Oregon Police. These two officers were active in the investigation of the killing of Dr. Broadhurst and in obtaining the statement of Alvin Lee Williams, the principal defendant. They did not have, and could not have had, any knowledge of any possible connection of petitioner with this crime other than what had been told to them by others. A fortiorari testimony that they presented to the Grand Jury was hearsay and incompetent, and upon this wholly incompetent evidence and that alone petitioner was indicted for first degree murder. This is the denial to petitioner of due process of law and a violation of the Fourteenth Amendment.

This Court has frequently examined the procedures of the Grand Jury, and has uniformly held that unless they are conducted with due regard to the rights of defendants and in compliance with the safeguards to which free men are entitled, they deny due process and violate the Fourteenth Amendment.

Norris vs. *Alabama,* 294 U. S. 587, 79 L. ed. 1074 (1934);

Rogers vs. *Alabama,* 192 U. S. 226, 48 L. ed. 417 (1903);

Hale vs. *Kentucky,* 303 U. S. 614, 82 L. ed. 1050 (1937);

Hollins vs. *Oklahoma,* 295 U. S. 394, 79 L. ed. 1500 (1935);

See also: *Powell* vs. *Alabama,* 287 U. S. 45, 77 L. ed. 158 (1942).

It is immaterial that the statute of the State is in accord with the precepts of the Fourteenth Amendment, and by its terms safeguards the rights and liberties of a defendant. This Court will go beyond such a statute, will disregard the rulings of the Supreme Court of the State in

determining compliance with the statute, and will upon independent investigation determine for itself whether the administration of the statute by the officers of the State charged therewith have been in conformity with the requirements of due process of law.

Carter vs. *Texas*, 177 U. S. 442, 44 L. ed. 839 (1899);
Pierre vs. *Louisiana*, 306 U. S. 354, 83 L. ed. 757 (1948).

Counsel have been unable to find a decision of this Court directly in point on the question of the constitutionality of the indictment by a Grand Jury based solely upon incompetent evidence. However, the rule is so generally recognized and so well established as a fundamental law that for this Court to sanction it would seem outrageous and shocking to the conscience.

In *People* vs. *Nitzburg*, 289 N. Y. 523, 47 N. E. (2) 37, the Court said:

> "The safeguards against unfounded accusations and unjust conviction provided for an accused by the Constitution and statutes may not be weakened by judicial decision to meet the supposed exigencies of a particular case. The guilty should not escape punishment, but punishment may follow only upon a finding of guilt by a jury upon a trial at which the safeguards provided for the protection of an accused have been zealously observed and guilt has been established by proof which conforms to legal standards. Repetition of what this and other courts have said about the wisdom of adhering to such standards and applying every safeguard against possible oppression in the administration of criminal law would serve no useful purpose."

The principle asserted by petitioner is well stated in *People* vs. *Price*, 6 N. Y. Crim. Rep. 141, 23 N. E. 1149:

> "The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent,

subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted."

In accord is *Sparrenberger* vs. *State,* 53 Ala. 481, 25 Am. Rep. 643, wherein the Court said:

> "On a motion to quash or to strike from the files, addressed to the court with reasonable diligence after the facts have been discovered, supported by evidence, leaving no reasonable doubt in the mind of the court that the indictment * * * was found without the evidence of witnesses before them, or legal documentary evidence, truth, and justice, the preservation of the verity and dignity of its own records, the protection of the citizen, and constitutional guaranty, demand that the court should expunge the spurious paper. It is not an accusation the citizen should be held to answer: it is without the warrant of law."

See also:

Royce vs. *Territory,* 5 Okla. 61, 47 Pac. 1083
People vs. *Glen,* 173 N. Y. 395, 66 N. E. 112
U. S. vs. *Harrington,* 5 Fed. 343
U. S. vs. *Rubin,* 218 Fed. 245
Brady vs. *U. S.,* 24 Fed. (2) 405

POINT C

Where evidence is secured by the State officials by unlawful search and seizure, the admission of such evidence against the defendant is a denial to the defendant of due process of law provided by the Fourteenth Amendment to the Constitution of the United States.

E. Otis Smith, District Attorney for Malheur County, Oregon, Charles W. Glen, Sheriff of the County, and Walter S. Walker, Sergeant of the Oregon State Police, with A. A. Moline, Sheriff of Canyon County, Idaho, went to the home

of petitioner near Caldwell, Idaho, and in the State of Idaho, several days after petitioner had been arrested for this crime and when she was incarcerated in jail. None of these officials had a search warrant, and it is admitted that they went without the knowledge or consent of petitioner. They searched petitioner's home and in a ventilator in petitioner's bedroom they found certain papers and documents.

Prior to the trial of this case petitioner presented to the Trial Court a petition for the return of these documents and papers, which was refused. Thereafter, and during the trial of the case, these papers and documents were admitted in evidence over the objection of petitioner. Petitioner asserts that the refusal of the Trial Court to return this evidence so wrongfully seized, and the admission of such evidence in the trial against her, is a denial of due process of law and a violation of the Fourteenth Amendment.

The Idaho Constitution, Article I, Section 17 (Appendix, p. 32), prohibits unlawful searches and seizures. This identical question has many times been decided in Idaho, and the rule is now firmly established that evidence obtained in violation of the Constitution by an unlawful search and seizure is inadmissible.

State vs. *Arregui*, 44 Ida. 43, 254 Pac. 788 (1927);
State vs. *Conner*, 59 Ida. 695, 89 Pac. (2) 197 (1939);
State vs. *Dawson*, 40 Ida. 495, 235 Pac. 326 (1925).

The Oregon Constitution, Article I, Section 9, (Appendix p. 33) is to the same effect and forbids unlawful searches and seizures. Likewise, it is the law in Oregon that such evidence wrongfully so obtained is not admissible.

State vs. *McDaniel*, 115 Ore. 187, 231 Pac. 965, 237 Pac. 373.

Although petitioner was adequately surrounded by the safeguards of the Constitution and laws of the States of Idaho and Oregon, nevertheless, these Oregon officials,

acting in their official capacity, openly defied these protective devices and by rifling petitioner's home secured evidence which was admitted against her. The right to protection against unlawful search and seizure is so ingrained in the political and moral philosophy of the people of this country that a suggestion that it be abolished or even curtailed would result in universal consternation and horror. This being so the citizens must look to this Court for protection when their State officials willfully and wantonly disregard so precious a right, and the Courts of their State, when redress is sought from them, look the other way. This is the use to which the Fourteenth Amendment has so frequently been put, and under it this Court is granted the power and authority to prevent State activities which result in a sacrifice of immunities which are so fundamental that they have become interwoven with the very connotation of freedom itself.

This identical question has frequently been considered by this Court in connection with the Federal Courts and agencies, and it has uniformly held that evidence wrongfully obtained under the Fourth Amendment is inadmissible under the Fifth Amendment.

Weeks vs. *U. S.* 232 U. S. 383, 58 L. ed. 652;
Boyd vs. *U. S.* 142 U. S. 450, 35 L. ed. 1077;
Agnello vs. *U. S.* 269 U. S. 20, 70 L. ed. 145.

Petitioner readily admits that the Fourth and Fifth Amendments as such have no application in the case at bar, inasmuch as they are not applicable to the States. Petitioner further concedes that a violation of one of the first eight Amendments does not necessarily mean a violation of the Fourteenth Amendment. However, this Court has held on many occasions that if the rights guaranteed by any of the first eight Amendments are considered to be the fundamental law of the land and proscribe activities so

intimately connected with the general conception of freedom and liberty, that their violation shocks the universal concepts of rights and immunities essential to freedom, that then that will be considered a violation of due process of law, and in such cases one or more of the first eight amendments will be considered as a criteria in assisting in the deliniation of due process. The attitude of this Court toward wrongful search and seizure is well stated by Mr. Justice Bradley in *Boyd* v. *U. S., supra:*

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

Other expressions of this Court should be considered in this connection. It is said in *Mooney* v. *Hollohan*, 294 U. S. 103, 79 L. Ed. 791 (1934), as follows:

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Herbert v. Louisiana, 272 U. S. 312, 316, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102. It is a require-

ment that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter v. Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581."

Again, the Court said in *Chicago B. & Q. Railway Co.* v. *Chicago*, 166 U. S. 220, 41 L. Ed. 979 (1896):

"It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the State Constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the

state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' "

See also:

Scott v. *McNeal*, 154 U. S. 34, 38 L. Ed. 896 (1893).

It is no answer to say that this Court will not pass upon the admissibility of evidence, for it has done so on many occasions, and where it determined, from an independent investigation, that fundamental rights were abridged it has provided relief under the Fourteenth Amendment. Unless this Court reviews and reverses this case then officials may with impunity disregard the constitutions and laws of the States in their determined efforts to secure convictions.

Akins v. *Texas, supra;*
Fiske v. *Kansas, supra;*
Chambers v. *Florida, supra;*
Ward v. *Texas, supra;*
White v. *Texas, supra.*

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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APPENDIX

Judicial Code 237(b), as amended, by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U. S. C. A. 344(b).

It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding papagraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Fourteenth Amendment to the Constitution of the United States, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O. C. L. A. 26-924. When two or more persons are charged in the same indictment, the court may, at any time before the defendant has gone into his defense, on the application

of the district attorney, direct any defendant to be discharged from the indictment, so that he may be a witness for the state.

O. C. L. A. 26-925. When two or more persons are charged in the same indictment, and the court is of opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defense, it must, if requested by another defendant then on trial, order him to be discharged from the indictment, before the evidence is closed, that he may be a witness for his co-defendant.

O. C. L. A. 26-934. In the trial of or examination upon all indictments, complaints, information, and other proceedings before any court, magistrate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, * * *.

O. C. L. A. 3-102. All persons without exception, except as otherwise provided in this chapter, who having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action, suit or proceeding are excluded; nor those who have been convicted of crime * * *.

O. C. L. A. 26-506. In the investigation of a charge for the purpose of an indictment, the Grand Jury shall receive no other evidence than such as might be given on the trial of a person charged with the crime in question.

Constitution of the State of Idaho, Article 1, Section 17. Unreasonable searches and seizures prohibited.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

Constitution of the State of Oregon, Article 1, Section 9. No law shall violate the rights of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized.